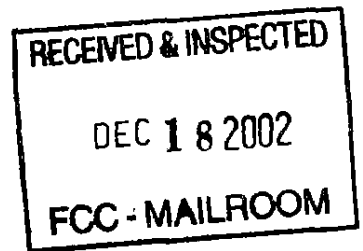


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December 17, 2002

Mr. William Maher, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20002

EX PARTE FILING

RE: Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98

Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. OS-147

Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, CC Docket No. 02-33

Dear Mr. Maher:

First, I would like to offer our compliments and our thanks to the Bureau for the rigor, focus, and dedication shown by Bureau personnel in examining the many complicated issues before it at this time. The issues in the proceedings noted above are not only complicated, but are critically important to customers of the telecommunications industry. The commitment to sound analysis evidenced by Bureau employees is the key to resolving these issues in a way that will provide the industry with a solid basis to move into the future.

That future, as outlined by Chairman Powell in his presentation at the Goldman Sachs Communicopia XI Conference in October of this year, embodies sustainable facilities-based competition, innovative and viable suppliers providing new services for customers, sound balance sheets to allow competition over the long-term, solid management teams capable of bringing customers the benefits of competition, and companies committed to making the investments necessary to innovate. McLeodUSA shares this vision.

Achieving this vision requires objective analysis. We cannot reach these goals by making decisions based on current fears and threats, any more than the irrational exuberance of the past could provide a solid footing for a competitive future. Neither a duopoly choice

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between incumbent telephone carriers and cable providers, nor a riotous market where companies exist without regard to the value of their business plan or the strength of their management, will adequately serve the needs of telecommunications customers. Consumers should be not forced to accept a future at either extreme.

As an industry-leading CLEC, McLeodUSA presents a unique perspective on these critical issues. As you know, we are committed to providing competitive facilities-based voice and data services over the long term throughout our 25-state footprint:

- We have been providing competitive local services since **1994**;
- We have completed a comprehensive recapitalization and are moving forward with a strong balance sheet;
- We have a revitalized management team in place with extensive turnaround experience, led by Chris Davis as Chairman and CEO;
- We are backed by the investment expertise of Forstmann Little & Co., which has invested \$1.2 billion in McLeodUSA and holds a 58% ownership interest;
- We have over 1 million access lines in service;
- As of September 30, 2002:
 - About 46% of lines were served using McLeodUSA switching and RBOC unbundled loops
 - About 37% of lines were served using UNE-P
 - About 17% of lines were served using resale
- We have migrated approximately 250,000 access lines from resale or UNE-P to our own switches over the past 18 months.
- We serve over 400,000 customers, over half of which are residential;
- We generate over \$1 billion in annual telecommunications revenue;
- We have invested nearly \$2.8 billion in our own network facilities, including almost \$200 million in local network facilities over the past 15 months.

For the goals of the Telecommunications Act to become reality, public policy must be responsive to the evolving telecommunications landscape. There are several critical ways in which that landscape has evolved, each of which is critical to the goals of the Act.

- **Telecommunications has become an industry of integrated services and networks.**

Voice, data, local, long-distance, telecommunications, and information services are rapidly merging. This is evidenced, for example, in the many bundled products offered by numerous carriers in the marketplace, including McLeodUSA. Fundamentally, customers are demanding the ability to move information over integrated facilities without regard to whether there is a "telecommunications service" or an "information service" involved. For the customer, such distinctions simply do not matter. Much as the supply of electrical energy is a "kilowatt" business, the capability of meeting communications needs is rapidly becoming a "kilobit" business. Unless competitors retain access to the loops and other elements necessary to provide

the integrated telecommunications services demanded by customers, effective and irreversible competition cannot be sustained.

- **Wircline providers of integrated services need full and complete access to incumbent carrier connections to end users.**

There are millions of miles of existing local telephone network plant currently in place throughout the United States.¹ This network is, and has always been, subject to continual addition and upgrade, based on available technology. There is no reasonable expectation that a ubiquitous competing network will be available any time in the foreseeable future.

As a result, to bring competition to customers, the incumbent's network must continue to be available to competing providers to meet any and all needs of customers for services that the facilities are capable of providing. Competitive providers, of course, must also continue to pay the costs of ILEC network elements they purchase. But a ruling that any end user connections of that local network plant are not necessary for competitors, or are not necessary for particular uses, will limit or eliminate competition for those services because the barrier to entry will be preclusively high. The result will be a duopoly between RBOCs and cable companies, with higher prices and lower service quality for consumers. This is inconsistent with the goals of the Act and will cripple the development of competition.

- **Transport connections must continue to be available to competing providers.**

Customer connections currently are concentrated at existing local exchange carrier wire centers. **As** a result, that is where competing providers also aggregate traffic from customers served out of the incumbent carrier's wire center. This aggregation can take place either at a competitor's collocation space, or through multiplexing of loops on dedicated transport (EELs) for transmission to alternate switching facilities. In either case, transport is required to move this traffic to a competing carrier's switching. Because no ubiquitous transport network other than the incumbent carrier's network exists, limiting access to these transport facilities will restrict or eliminate customer choice in service providers. Consequently, transport connections must be made available to competing providers for competition to succeed.

- **Pricing for network elements provided by incumbent carriers should be based on TELRIC.**

McLeodUSA believes that competing carriers must pay fairly for the network elements they use. This is, in fact, the very essence of the TELRIC methodology adopted by the Commission. There is almost no merit in any of the arguments against TELRIC pricing that the incumbent carriers have raised. That methodology is conceptually correct because it fairly compensates incumbents for both a return of, and a return on, their capital, and it has *been*

¹ This network, which was largely constructed during a time when ILECs had their monopoly rates set to allow them to recover both a return of and a return on their invested capital, is beyond the ability of any company to **duplicate** today.

upheld by the United States Supreme Court in the face of exactly the same arguments that many incumbent carriers continue to make.

Each of these issues is examined in more detail below

Telecommunications Has Become An Industry Of Integrated Services And Networks.

We commend the Commission for its market-based approach to telecommunications issues. McLeodUSA, as a competitive provider of integrated services, understands the requirements of markets very well. We also understand that, when the requirements of customers are changing, the response of service providers, and of regulators, must also change. One of the changes that is currently underway is an evolution from a world of differentiated services with individual characteristics to a world where suppliers provide customers with the ability to move information without regard to the nature of that information. That change has important implications for the issues currently before the Commission.

Customers expect integrated services unrelated to historical distinctions between voice and data services, or to regulatory classifications such as local service and long distance service, or "telecommunications services" and "information services." If facilities are in place that are technically capable of providing certain services, regardless of classification, customers will expect those services to be available. Customers should not have to consider, or even be aware of, legal nuances related to how their premises equipment interacts with network facilities and intelligence, and whether the result falls into a category called "telecommunications services" or a category called "information services." The integrated services at the foundation of telecommunications markets are not susceptible to such distinctions.

There is ample evidence of this phenomenon in the marketplace. Numerous carriers, including both McLeodUSA and RBOCs in states where they have received long-distance authority pursuant to Section 271, offer bundles of services for the convenience of the customer. These bundles are frequently designed to offer customers a particular functionality without regard to historical service categories. McLeodUSA finds it peculiar that RBOCs in particular, who have gained the ability to offer integrated services by complying with the "competitive checklist" requirement to offer UNEs, are now advocating a restriction on the ability of other companies to provide the same integrated packages using unbundled loops.

To its credit, the Commission has had in place for several years a framework which largely allows this transparency for customers. The distinction between "information services" and "telecommunications services" has been of little interest to customers because of the Commission's treatment of information services as containing a component of telecommunications services.² This treatment, which was embodied in the Telecommunications

² We have used the current "telecommunications services" and "information services" distinctions, instead of the earlier but analogous "basic services" and "enhanced services" terminology, for the purpose of consistency. See *In Re Federal-State Joint Board on Universal Service*, "Report to Congress," FCC 98-67, CC Docket No. 96-45 (April 10, 1998), at p. 12.

Act. allows competitors to provide a “telecommunications service” using unbundled network elements, and then to add the functionality constituting an “information service.” As a result, the customer need not be concerned with the regulatory classification; they need only know whether their selected provider has the technological capability to provide the services they want. This is an essential element in providing customers with a meaningful choice of providers.

One of the key proceedings currently pending before the Commission is the *Broadband NPRM*. Although that proceeding specifically addresses wireline broadband internet access services³, the Commission has recognized that that “the terms ‘broadband’ and ‘broadband services’ are elusive concepts, as they have come to mean many different things to many different people.”⁴ In today’s world of fully integrated services and networks, these lines become even more blurred. For example, a 200 kbps service which the Commission would typically classify as “advanced” or “high speed”⁵ could be used for data transmission, internet access, multiple voice channels, or a combination of all three, perhaps even changing dynamically depending upon the needs of the user. Questions such as whether a 200 kbps connection used solely for multiple voice channels qualifies as an “advanced service” are inherent in a regulatory process which contains separate rules for “broadband” facilities, but they are increasingly irrelevant to customers who demand full capabilities from an integrated services provider.

What is relevant to customers is having a meaningful choice of sound, facilities-based suppliers of integrated services that meet their needs. McLeodUSA is, and intends to continue and grow as, one of these suppliers. In order to continue being a viable supplier, however, any competitive carrier must have access to the critical bottleneck facilities of incumbent carriers that cannot be economically or practically duplicated; and it must have equal access to those facilities for the purpose of providing any amount of “kilobits” that consumers demand. No provider trying to enter the market to provide electricity could compete based on rules that required it to tell prospective customers “I can provide power for your lights, but you need to find someone else to provide power for your television and computer,” while its primary competitor is not subject to the same limitation. And no provider of “kilobits,” including McLeodUSA, can compete if the ground rules deny access to incumbent carrier connections to end-users that are capable of carrying over 200 (or any set number of) kilobits per second to customers. Yet this result is precisely what some incumbent carriers are advocating in the *Broadband NPRM*.

The effect on competition of these types of restrictions is not simply to limit CLEC access to DSL-type broadband services that may be offered by incumbent carriers. Rather, the risk is that ILEC’s will seek to use a permitted distinction between broadband and other telecommunications services as a means to restrict access to the unbundled loops over which all

³ *In Re: Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33 (*Broadband NPRM*)

⁴ *Broadband NPRM*, n. 1

integrated services are provided. This would effectively deny that competitor the advantages of an integrated network to provide the services that the customers demand. The result would be to effectively stifle competition at its roots. Consumers will be denied the benefits of competition under such a restriction.

For consumers to truly benefit from competition, their choice must include more than a forced duopoly between companies with monopolistic histories and tendencies. The need to ensure a meaningful choice of suppliers should be paramount in the Commission's consideration of broadband issues. An integral part of the consideration should be the Commission's own authority to ensure that consumers have the choices envisioned in the Telecommunications Act. For example, in the *Broadband NPRM*, the Commission has proposed to treat ILEC broadband services as interstate information services under Title I of 47 U.S.C., rather than as containing a "telecommunications services" component under Title II. The language of 47 U.S.C. Sec. 251(e)(3), however, limits the use of unbundled network elements purchased by McLeodUSA to providing a "telecommunications service." Because of this, it is virtually certain that RBOCs would contest McLeodUSA's ability to use unbundled loops to provide "broadband" services (that is, services moving a large number of kilobits), if the tentative conclusions of the *NPRM* are ultimately adopted. Until McLeodUSA and other competitive carriers are assured effective access to alternative sources of loop facilities for use in providing broadband service to end users, we believe that a change in classification such as that proposed in the *NPRM* would eliminate any meaningful choice for consumers.

McLeodUSA recognizes that the Commission's ancillary jurisdiction under Title I may allow it to continue to impose some level of regulation on such services. This jurisdiction, however, is an anemic substitute for the broader powers of the Commission under Title II. Commission jurisdiction to require nondiscriminatory, timely, and efficient provisioning of loops for use in providing competitive broadband services to end users is uncertain under Title I. To rely on this jurisdiction serves to create additional uncertainty, including a potential new grounds for court appeal⁶, at a time when the primary need of the industry is for increased certainty.

To the extent that broader flexibility in RBOC provisioning of broadband services to end users is warranted because of intermodal competition, the Commission already has the appropriate proceeding underway.⁷ There is no reason for this concern to influence the more fundamental question of competitive access to the underlying wireline facilities needed by competitors to integrated provide services to customers, without regard to whether those services are broadband, dial-up internet, or voice. Until there are alternative sources of such underlying wireline facilities available to providers through a functioning ubiquitous wholesale market, the Title II classification of the transport used to provide broadband services must remain intact.

⁶ See, e.g., *Motion Picture Association of America v. Federal Communications Commission*, Nos. 01-1149, 01-1155, slip op. (D.C. Cir., November 8, 2002)

⁷ *In Re: Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337.

The Commission should reject attempts to "fence off" certain loop facilities from use by competitors, on the grounds that those facilities are "broadband," "contain fiber," or for any other similar reason. **All** these distinctions are meaningless to customers, who are interested in real choices, robust services, timely provisioning, and fair prices. In a kilobit world, a limitation on access to loop facilities based on the "amount" of kilobits provided places new entrants in an impossible position. Ultimately, such a decision would deny to customers the choice of providers that they want and deserve, as contemplated by the Telecommunications Act.

Wireline Suppliers of Integrated Services Need Full and Equal Access to Incumbent Carrier Connections to End Users.

Even without a limitation on the volume of kilobits that can be carried over incumbent facilities leased by new entrants, barriers exist today that can prevent a competitive future from becoming reality. There is no ubiquitous wireline network other than the network of the incumbent local exchange carriers, and there is no reasonable expectation that a competing ubiquitous network will be available any time in the foreseeable future. The only existing "competing" facilities for integrated services are existing cable plants, which are available primarily to residential customers. As a result, denying competitive telecommunications providers access to wireline facilities for use in providing integrated services is likely to result, at best, in a duopoly for residential customers, and a monopoly for business customers.* Customers will not be happy with this result, and neither should regulators at either the state or federal levels.

With facilities fully available, however, other companies committed to competition for integrated services could constrain the monopolistic tendencies of both incumbent telecommunications carriers and cable companies. **As a result**, to bring irreversible and effective competition to customers, the key elements of the incumbent network must be available to competing providers on an unbundled basis pursuant to Section 251. The single most important of these elements is the connection between the RBOC's central office and the end-user: the loop.

One of the most critical elements affecting our ability to migrate customers on-switch is nondiscriminatory access to all types of loops. McLeodUSA has specifically avoided migrating types of lines known to be especially sensitive to loop quality (for example, lines to which modems, fax machines, or credit card validation terminals are connected) because of the risk that the customer will experience service problems as a result of the inferior loop that is likely to be delivered to McLeodUSA by the RBOC. The crux of this problem lies in the RBOCs' unwillingness to provide nondiscriminatory access to IDLC-provided loops.

* Given the demonstrated tendency for both RBOCs and cable companies to merge rather than compete, one might also question whether a tacit market division would result in a monopoly supplier in both markets.

As a general matter, incumbent carrier retail customers today are served by one of three types of loops. First, the customer may be on a connected-through copper loop, with a direct analog electrical connection between the customer's network interface and the central office main distribution frame (MDF). Second, the customer may be served by a universal digital loop carrier (UDLC) system, in which a customer is connected via a copper subloop to a remote terminal (RT) in which an analog-to-digital (A/D) conversion is made, then via a digital (either electrical or optical) transmission system to a central office terminal (COT), where there is a digital-to-analog (D/A) conversion back to DSO level before connection to the MDF. Finally, the customer may be served by integrated digital loop carrier (IDLC) system, in which a customer is connected via a copper subloop to a remote terminal (RT) in which an analog-to-digital (A/D) conversion is made, then via a digital (typically optical) system to the central office switch.⁹

When a customer on a connected-through copper loop or a UDLC system switches to McLeodUSA as a local service provider, that customer would typically remain on the same physical loop, and thus the quality of the loop received by McLeodUSA would generally be the same as the quality of the loop used by the RBOC to serve that same customer. When an RBOC customer currently served by IDLC chooses to switch to McLeodUSA, however, that customer is removed from the IDLC and moved to either a connected-through copper loop, or a UDLC system. The real-world effects, on both customers and competitors, of the refusal to allow access to IDLC-provided loops is tremendous.

When an IDLC-provided loop is moved to a copper loop or a UDLC system the customer can experience a substantial degradation in service quality, for both voice and dial-up data service applications such as fax machines, modems, and credit card validation machines. It is important to note that this degradation affects not just what might be considered as "broadband" service, but standard "narrowband" services as well.¹⁰ For example, a customer moved from IDLC to UDLC will experience a minimum of one "new" D/A conversion, and is very likely to experience reduced modem speeds as a result. Even for standard voice services, moving the customer off IDLC can result in reduced voice volume and corresponding customer complaints. It is also important to recognize that the loop qualification and makeup data does not provide a mechanism to anticipate these problems, since that data only pertains to the makeup of the customer's existing loop. In cases where the customer is moved from IDLC to UDLC or a connected-through copper loop, no information is available to competitors about the characteristics of the loop to which the customer will be moved.

There is also no effective way for competitors to anticipate this problem in advance. McLeodUSA records may indicate whether, at the time of installation of service, a particular line

⁹ Under some circumstances, a digital crossconnect system (DCS) may also be installed between the IDLC and the switch.

¹⁰ The mere fact that a customer may be forced to change loop technology when changing carriers also subjects customers to an unnecessary service interruption while the serving loop is converted from IDLC to either UDLC or a connected-through loop. Any problems occurring during this conversion serve only to increase the out-of-service time and resulting customer inconvenience, giving the perception that the competing carrier is unable to provide adequate service even though that carrier has no control over the situation.

was *being* used as a modem, fax, or credit card validation line. Customers have a reasonable expectation, however, that any line purchased from McLeodUSA (or any other supplier) will be suitable for such a use. As a result, lines used for this purpose can change over time, without the knowledge of the service provider. Under these circumstances, there is no way to identify in advance whether a given line will present a problem; McLeodUSA must simply await a trouble report from the customer (with the concomitant customer disappointment and the appearance that McLeodUSA has done something "wrong" to cause the problem).

The frequency with which we experience these problems depends upon the penetration of IDLC systems in McLeodUSA's target markets. The penetration of IDLC in existing loop plant is generally related to the amount of growth and the age associated with the infrastructure in the market. For example, in Arizona Qwest reports that about 21% of its total loops are provided via IDLC.¹¹ And in Richardson, Texas, there is a particular central office where McLeodUSA has established a collocation but has no access to unbundled loops in high-growth areas at all, since SBC has installed IDCL to serve all customers in the CO.¹²

As a short-term response to avoid undesirable customer impacts, McLeodUSA has also attempted to minimize problems by simply not migrating lines from UNE-P to our own switches where we believe there is a substantial likelihood of a problem. For example, we have to date deliberately avoided migrating over 6100 customer lines because of the inferior loops we receive from the RBOCs, and have in fact had to establish a process to "de-migrate" certain lines from our own switching facilities, and move them back to RBOC switches, because of the inferior loop connections we received from the RBOC during the move to a McLeodUSA switch. We anticipate that, of about 450,000 existing McLeodUSA lines remaining to be migrated off-switch, over 80,000 lines (more than 17%) will be lines with the potential to experience loop quality problems during the migration. These problems result from the failure of RBOCs to provide us with a loop equal in quality to the loop they provide to themselves.

This is not a transitory issue, and it is clear that the effects of these loop quality problems are likely to become even pronounced in the future:

- RBOCs will continue to deploy increasing quantities of IDLC. In many areas, this seems to be the preferred long-run technology. For example, the Wisconsin Public Service Commission found that based on Ameritech's construction forecasts, TELRJC prices should be based on a network consisting of 50% IDLC and 50% UDLC. (*Investigation Into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161, March 22, 2002, at p. 131.)
- Customers will continue to demand high-quality loops in order to meet their needs for data services and acceptable voice quality.

¹¹ Source: Qwest ICONN database, available at <http://www.qwest.com/iconn/>

¹² The CLLI code for this central office is DLLSTXRNHT1.

- **Any** reduction in the availability of unbundled switching will cause additional demand for loops provided over non-IDLC facilities.
- Reduced maintenance costs resulting from the use of IDLC will continue to drive additional IDLC deployment by RBOCs.

The lack of equal access to IDLC-provided loops can also prevent a competitor from entering a market at all. As competitors gain more customers, the quantity of available connected-through copper loops and UDLC loops will eventually be “consumed” by CLEC customers. Once these existing facilities are exhausted, CLECs must either cease adding customers, or pay the frequently-exorbitant (and non-TELRIC-based) “special construction” or “facilities modification” charges imposed by the RBOC. For example, McLeodUSA has been asked to pay more than 574,000 and wait at least sixty days for the installation of single DSL-capable loop to a customer with existing service provided via IDLC. Clearly, it is not possible to effectively compete under these conditions.

Opponents of IDLC unbundling generally do not contest these significant quality of service and competitive concerns. Rather, they respond to these concerns by asserting that it is not technically feasible for them to unbundle loops provided over IDLC.¹³ This is not a new argument: over six years ago in the *First Report and Order*, the Commission rejected RBOC arguments that it was not technically feasible to unbundle IDLC-provided loops.¹⁴ The modern generations of IDLC make the FCC’s original conclusion even more compelling. Most “Next Generation” IDLCs (Lucent, Fujitsu, Zhone) are designed to service multiple carriers from a single IDLC chassis. This IDLC equipment can be configured to provide for separate interface groups. These interface groups are logical subdivisions of the IDLC chassis. Different carriers are then assigned an individual interface group. Typically there will be a narrowband and broadband partition to these assignments, with narrowband partitions being used for POTS services and broadband partitions for higher speed access (TI, xDSL).

UNE loops providing traditional POTS services are terminated to the IDLC on the narrowband portion of the equipment. UNE loops used for higher bandwidth services (which may include multiple voice lines) are terminated to the IDLC on the broadband portion of the equipment. From the IDLC in the RT or the CO, these loop connections are routed to the appropriate carrier’s interface group and sent to that carrier’s switch or collocation via a crossconnection and transport at the DS1 or DS3 (or higher) levels.

Equipment vendors may each have different variations on how this function is performed, but the effect is basically the same. These typical methods of segregating narrowband and broadband UNE connections can be used to “unbundle” UNE loops provided via IDLC.

¹³ If this claim is true, it is appropriate to question whether deploying such equipment should trigger the network change notification requirements of 47 CFR Sec. 51.325.

¹⁴ *First Report and Order*, Par. 383. The Commission found that a contrary holding would deny customers served by IDLC an equal choice of carriers, and would encourage RBOCs to “hide” loops from competitors through the use of IDLC.” *Id.*

It is true that certain older IDLC equipment may not be able to perform these functions effectively, or may have limitations on the number of interface groups available. But we believe that these situations are limited, and do not represent the technical barrier claimed by incumbent carriers.¹⁵

Ensuring effective access to these connections to end users is the key to providing meaningful choice to consumers. One of the most contentious issues before the Commission in the Triennial Review is the availability of unbundled switching (rather than unbundled loops). Because unbundled switching is purchased only for use with unbundled local loops, the conditions under which loops are provided will influence the demand for unbundled switching. It will be extremely difficult for the Commission to conduct an appropriate "impairment" analysis for unbundled switching without first ensuring access to self-provisioned switching, which will only be feasible if equal availability of stand-alone unbundled loops is ensured.

Specifically, if unbundled loops are provided in conjunction with unbundled switching in a manner or configuration different than the manner or configuration in which unbundled loops are provided on a stand-alone basis, those differences will distort the demand for unbundled switching. For example, if the loop provisioned as part of a "loop plus switching" bundle is qualitatively superior, or if the provisioning process is easier, faster, or less expensive, than for a stand-alone loop, the demand for unbundled switching will increase not because of a desire to use the switching, but because of the desire to take advantage of more favorable loop provisioning conditions or avoid the pitfalls of using an inferior stand-alone unbundled loop. This inferiority serves to increase the demand for unbundled switching above the levels that would prevail if equal access to stand-alone loops were guaranteed. As a result, it is not possible to have an accurate picture of the state of the market for unbundled switching, since differences in loop quality and availability substantially impact the demand for unbundled switching. Conversely, it is only after equal loop availability is guaranteed that an accurate "impairment" analysis can be conducted.

For the reasons noted above, it has been McLeodUSA's experience, gained during the migration of over 250,000 customer lines from resale and UNE-P to our own local switching platform, that it can be substantially easier to obtain an unbundled loop in conjunction with a switch port than it is to obtain a stand-alone unbundled loop; and that the stand-alone loops are often substantially inferior in quality to loops purchased in conjunction with unbundled

¹⁵ In particular, McLeodUSA believes that Alcatel has not yet included this functionality in the current versions of its IDLC software. We believe that Alcatel, like other manufacturers of comparable equipment, does have the technical ability to provide this functionality, but that it is not yet generally available. Based on conversations with Alcatel, we believe that this functionality will become available in their next general code release. McLeodUSA understands that Alcatel equipment has been widely deployed by incumbent LECs. It is also undeniable that incumbent LECs have almost no incentive to press for the rollout of this functionality on their own. Adoption by the Commission of the standards which embody this functionality as part of technology for unbundled local loops would clearly serve to speed deployment.

switching.¹⁶ As a result, it is critically important for the Commission to resolve the issues related to access to stand-alone unbundled loops before it determines whether the elimination of unbundled switching in some or all markets is appropriate. To do otherwise is to render any Commission impairment analysis regarding unbundled switching incomplete and invalid.

Because RBOCs typically provide inferior loops to competitors when a customer is switched from an IDLC-provided loop, the demand for switching is increased. This, however, is only one of the factors which serves to artificially increase the demand for loops bundled with switching. Several other limitations affect the ability of McLeodUSA to efficiently use stand-alone loops:

- Because of the need for technicians to manually cut over loops which are switched to competitors, RBOCs typically impose limitations on the number of conversions from UNE-P to stand-alone unbundled loops that be performed in a given CO in a given day. Although the RBOCs are not willing to provide written documentation of these limitations, they are imposed as part of “projects” to migrate customers from UNE-P to McLeodUSA’s own switching. We have typically found SBC to be most restrictive in the “old Ameritech” area, with a universally-applied limit of 25-35 orders per CO per day.
- When customers are switched from IDLC-provided loops, RBOCs are unwilling to provide a “coordinated” hot-cut. Instead, we are told only that the conversion will happen sometime during a particular business day. As a result, McLeodUSA is unable to tell its prospective customer when the customer will be out of service during the cut-over process, with the resulting perception of service quality problems.
- When McLeodUSA serves a customer using UNE-P, the interval to switch the customer to McLeodUSA service can be as short as the same day. This is consistent with the RBOC’s performance for its own customers, which shows (in ARMIS data) typical installation intervals of 1-2 days. The shortest interval over which it is possible to obtain an unbundled loop is four business days.
- RBOCs do not universally provide an adequate electronic method to identify whether or not a loop is served through a remote terminal. In some cases, the data is incomplete. In others, it is simply wrong: The loop makeup information in the preorder process does not provide any indication that a loop is served from a remote terminal, but two days

¹⁶ In addition, the nonrecurring charges to purchase a loop plus switch port combination are typically substantially less than those associated with purchasing a stand-alone UNE loop. This result from the relative ease of purchasing the combination, compared to the cumbersome and costly manual process used to provision most stand-alone unbundled loops. These latter costs are further inflated by the labor-intensive process used to provide stand-alone UNE loops for customers currently served via IDLC.

before the actual conversion we will be told that an RT is in use. This invariably requires that the customer's conversion be rescheduled.

- The Customer Service Records (CSRs) that McLeodUSA receives when converting a customer to a stand-alone loop frequently is incomplete with respect to data such as off-premise extensions, dual ring circuits, distinctive ringing, and intragroup dialing.
- RBOC EDI systems frequently do not provide the same information and capabilities as their "toolbar" systems, thus making it difficult for McLeodUSA to take advantage of the efficiencies of EDI.
- McLeodUSA continually encounters in RBOC EDI systems "System Defects" that hinder their ability to meet the company line count forecast projections and customer delivery dates associated with product platform conversions. Most of these defects cause McLeodUSA to revert from an electronic ordering mechanism to a manual ordering process, with resulting increased head count, loss of productivity, and missed customer delivery intervals.

These factors each have a direct effect on the experience of customers who choose service from McLeodUSA. Because of the inability of McLeodUSA to obtain equal access to loops (in terms of both quality and provisioning), customers can experience degraded service, delayed conversions, inoperative features, improper directory listings, or a host of other potential problems. These are not just hypothetical issues for customers. In each case, the problem can cause the customer to question the competence of its new local service provider. The fact that the problem may be neither caused by nor within the control of the CLEC is generally irrelevant to the customer. The customer knows only that things used to work without problems, but that after switching service to a competitor problems arose. This alone can be enough to sour customers on the competitive process.

Both loop quality and provisioning differences serve to artificially increase the demand for unbundled switching. As a result, for the Commission to be able to determine the actual demand for unbundled switching, these differences must be eliminated. Specifically, the Commission must include requirements in its rules for provisioning standards and treatment of IDLC-provided loops in particular, and all loops in general, as an integral part of any reduction in the availability of unbundled switching. These requirements include:

- Loops provided over IDLC shall be available to CLECs via either a DCS or a subinterface on the TDLC. These loops would then be available digitally (without D/A conversion) for connection to the CLEC collocation space, or for connection to multiplexing and transport for delivery to the CLEC's network.

- Costs of providing access to IDLC-provided loops would be calculated as part of the overall costs of loops under TELRIC, and thus would be reflected in recurring loop rates. No “special construction” or “facilities modification” charges would apply.
- If multiple loop architectures serve the same customer location, the CLEC shall have the choice of the loop architecture that will best meet the customer’s needs.
- When a customer changes to a different local carrier, an RBOC shall not place the customer on a different loop or another loop architecture than that currently used to serve the customer, without the consent of the new local carrier.
- Access to detailed outside plant information from the RBOCs (including copper pair assignments, cross-box information, and distribution area information), including but not limited to outside plant information on all loop or loop component inventory that could be used to provide service to the customer premise.
- Access to detailed information about pair gain technology (UDLC or IDLC) deployed in an area, including vintage, manufacturer, model, and capacity (ports/cards available).
- Access to detailed information about transport technology used between a RT and the CO, including the configuration of the transport and traffic characteristics.
- Complete DCS assignment information, sufficient to allow for proper routing of all channels to the carrier selected by the customer.
- Ability to effectively multiplex loops, including DSO loops, for combination with dedicated transport for transmission to the CLEC’s network.
- Unbundled digital transport, available from an RT to a CLEC’s point of interconnection, that could be provisioned in advance and be ready for immediate migration of loops served from the RT through CFA assignments.

Once established, these standards would provide a specific “checklist” for use in determining where a phase-out of unbundled local switching is appropriate. Once the conditions in the checklist have been finalized and met, a phase-out of unbundled

switching¹⁷ could begin. In such a way, the Commission could promote facilities-based competition while at the same time ensuring that the overall pro-competitive goals of the Act are met. The key to this process will be the Commission's recognition of the fact that the market for unbundled switching cannot be viewed in isolation from these critical issues surrounding the unbundled loops to which that switching is connected.

Of course, even these standards will not be sufficient for equal loop provisioning in the long run. Over the course of the next Triennial Review, the Commission should make a concerted effort to understand electronic loop provisioning (ELP) and the issues surrounding ELP. AT&T has presented to the Commission a proposal on ELP as part of the instant proceeding, and McLeodUSA supports the general direction of that proposal.¹⁸ In the long run, to expect competitors to efficiently and smoothly migrate customer lines among themselves using a process that depends on disconnecting and reconnecting a myriad of wires in the central office is unrealistic. Even when all parties act in good faith, the opportunities for mistakes (and resulting customer outages) are simply unacceptable. All carriers should work to ensure, over the long run, that loops are presented digitally at the central office, so that carrier changes by a customer can be achieved through a software translation that reroutes traffic to the appropriate carrier, rather than by rewiring the appearance of customer loops at the MDF.

Although much of the controversy in the Triennial Review is focused on UNE-P, the Commission should not allow itself to be distracted from the key issue affecting customers of competitive carriers, regardless of whether they are served by UNE-P or by a standalone unbundled loop. That issue is full nondiscriminatory access to connections to end user customers. Once that issue is resolved, issues surrounding unbundled switching can be placed in proper perspective.

Transport Connections Must Continue to be Available to Competing Providers.

Customer connections currently are concentrated at existing local exchange carrier wire centers. **As** a result, that is where competing providers also aggregate traffic from customers served out of the incumbent carrier's wire center. Transport is required to move this traffic to a competing carrier's switching; and no ubiquitous transport network other than the incumbent carrier's network exists today, or is likely to exist in the foreseeable future.

¹⁷ McLeodUSA is not proposing specific details of a phase-out at this time, although any such process should take place over a sufficient time to allow carriers currently using UNE-P to move to their own switching without substantial hardship.

¹⁸ AT&T has advocated the use of ATM transport protocol associated with ELP, and while McLeodUSA does not object to this, we believe that the **choice** of a transport protocol should **not** obscure the greater good of ELP itself. What is important is that the industry move toward ELP, not that a specific transport protocol be used.

As of September 30, 2002, McLeodUSA had deployed 513 collocations in RBOC central offices throughout our 25 state local service area. Of those, however, only about 25% are linked directly to McLeodUSA's own fiber optic network. **All** the remaining collocations require that McLeodUSA purchase transport from some other provider in order to connect to the customers served by the collocation to McLeodUSA own switching network. Of the off-net collocations, transport in approximately 90% is purchased from an RBOC. **As** a result, without the availability of RBOC transport in these instances, McLeodUSA would still not be able to provide service to its customers.

This high percentage of transport purchased from RBOCs reflects a simple fact: in most instances, there are no effective alternatives to such RBOC transport. It is McLeodUSA's policy to purchase transport from alternate suppliers when available, consistent with McLeodUSA's network needs. We find that, however, in most instances there is simply no real alternative to the RBOC. Contrary to the arguments of some, this is not because TELRIC pricing forces the RBOC to provide transport at below cost.¹⁹ Indeed, where alternative suppliers exist, we typically find them to be less expensive than RBOC TELRIC rates. It is instead the lack of alternative suppliers that requires the use of RBOC transport. **As** a result, McLeodUSA would clearly be impaired in its ability to provide competitive services without access to unbundled transport.

We also have continuing problems with access to dedicated transport as a UNE at all. We are often presented with situations where we are told by the RBOC that no facilities are available when transport is ordered as a UNE, only to find that if an identical circuit is ordered as special access the order will be completed. The result is that UNE customers are not treated in a nondiscriminatory manner vis-a-vis customers for access products.

RBOC transport is also a necessity to allow service to customers in the absence of collocation. Even where no collocation has been established, a CLEC can still use its own switching facilities if it can efficiently obtain access to unbundled dedicated transport (and multiplexing) for consolidation of loops at an end-office. In this case, an EEL can be used which consolidates customer traffic for connection to the CLEC's own network; but RBOC transport is still required for this option to be feasible.

It is no answer to say that such transport would continue to be available from access tariffs, and therefore does not need to be made available at TELRIC rates as a UNE. Such an argument ignores the requirements of the Telecommunications Act itself. For example, the fact that loops and switching may also be available for purchase by competitors at wholesale rates from the RBOC (as part of local exchange service) does not eliminate the RBOC's obligation to make those items available on an unbundled basis. In the same way, the availability of transport under access tariffs does not affect the need to make transport available as a UNE if the statutory requirements are met. In

¹⁹ See the discussion of TELRIC pricing *infra*.

light of McLeodUSA's dependence on RBOC transport to serve its customers, this plainly is the case

Pricing for Network Elements Provided by Incumbent Carriers Should be Based on TELRIC.

McLeodUSA strongly supports the requirement for competing carriers to pay fairly for the network elements they use. This is, in fact, the very essence of the TELRIC methodology adopted by the Commission. There is almost no merit in the arguments against TELRIC raised by incumbent carriers. The TELRIC methodology is conceptually and economically sound, and has been upheld by the United States Supreme Court in the face of exactly the same arguments that many incumbent carriers continue to make. At their heart, the RBOC's arguments about pricing for UNE-P are nothing more than an all-out assault on TELRIC, and are principally a prelude to an endgame argument for higher prices for unbundled loops. It is instructive that J. P. Morgan Securities has recently noted that "UNE-L economics are even worse for the Bells than UNE-P economics."²⁰ Thus, the Commission should recognize the RBOC's TELRIC arguments for what they are: the natural desire of a monopoly supplier to increase the price of an essential item for competing customers that have no alternatives.

Perhaps the simplest answer to arguments that TELRIC-based prices for UNE-P (and, presumably, TELRIC prices for all other UNEs) are "below cost" is that this is a question for the States, not the FCC. Under 47 CFR Subpart F, the states set prices for UNEs applying the TELRIC methodology adopted by the Commission. Opponents of TELRIC have not been shy about instituting proceedings to increase UNEs prices in various states, nor have they foregone appeals when they have not agreed with state PUC decisions in those proceedings. The fact that some companies do not agree with the decisions in some states is hardly a justification for a wholesale change in either UNE definitions or pricing principles.

Even if it were the province of the Commission to set specific prices for UNEs, however, the facts do not support the opponents of TELRIC. There is simply no evidence that TELRIC-based UNE prices are in any way "below cost." In fact, in the words of the Supreme Court:

... what we see from (here) record suggests that TELRIC rate proceedings are surprisingly smooth-running affairs, with incumbents and competitors typically presenting two conflicting economic models supported by expert testimony, and state commissioners customarily assigning rates based on some predictions from one model and others from its counterpart.²¹

²⁰ US Equity Research, J.P. Morgan Securities, Inc., "Wireline Services/Incumbents", November 14, 2002.

²¹ *Verizon Communications, Inc. v. Federal Communications Commission*, 122 S. Ct. 1646, 1678, 152 L.Ed.2d 701 (2002).

This conclusion is buttressed by McLeodUSA's own experience. In every state TELRIC proceeding known to McLeodUSA, the state commission has included in the TELRIC price both the return of (through a depreciation allowance) and the return on (through a rate of return) the capital that would be invested by the incumbent to provide the UNE in question. Indeed, the TELRIC model itself is based largely upon the standard Total Service Long-Run Incremental Cost (TSLRIC) methodology championed by the RBOC for years for pricing many of its own retail services. It is hard to imagine how this could be anything other than fair compensation to the incumbent; and to conclude that this methodology somehow eliminates incentives for incumbent carriers to invest in their networks is nonsensical. Indeed, that is certainly contrary to how RBOCs positioned TSLRIC when advocating for its use in the past in state ratemaking proceedings for retail services.

It is also important to keep firmly in mind the recent 6-year history of TELRIC. Despite the best efforts of some RBOCs, the FCC's authority to adopt its pricing rules -- and the TELRIC methodology -- was confirmed by the Supreme Court. Despite continued efforts to overturn the substance of those rules, the Supreme Court in a second case upheld the rules on a substantive basis. In doing so, the Supreme Court rejected arguments that are virtually identical to the arguments that some incumbent carriers are now presenting to the Commission. For example, the Supreme Court examined incumbent carriers' arguments that TELRIC-based UNE prices would not stimulate investment, and found that "[t]he basic assumption of the incumbents' no-stimulation argument is contrary to fact."²² After carefully analyzing, and rejecting, both the underlying assumptions of the arguments of incumbent carriers, and those arguments themselves, the Court concluded:

At the end of the day, theory aside, the claim that TELRIC is unreasonable as a matter of law because it simulates but does not produce facilities-based competition founders on fact. The entrants have presented figures showing that they have invested in new facilities to the tune of \$55 billion since the passage of the Act (through 2000) . . . The incumbents do not contradict these figures, but merely speculate that the investment has not been as much as it could have been under other ratemaking approaches, and they note that investment has more recently shifted to nonfacilities entry options. We, of course, have no idea whether a different forward-looking pricing scheme would have generated even greater competitive investment than the \$55 billion that the entrants claim, but it suffices to say that a regulatory scheme that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.²³

It should not be surprising that the Court so soundly rejected the arguments against TELRIC pricing. The Commission's adoption of this pricing methodology was

²² *Id.* at 1669

²³ *Id.* at 1675-76

based on an exhaustive consideration of the alternatives, as set forth in the *First Report and Order*.²⁴ Despite the continuing argument of some incumbents that the Commission adopted unrealistic hyper-efficient network standard for TELRIC pricing, the fact is that the Commission explicitly rejected this approach, and chose a middle ground between extreme efficiency and allowing incumbents to shift all costs of inefficient networks to new entrants.²⁵ It did so because the TELRIC pricing methodology adopted “most closely represents the incremental costs that incumbents actually expect to incur in making network facilities available to new entrants.”²⁶

Relying on a forward-looking cost methodology sends the correct price signals to new entrants: Since the new entrant would construct using the most efficient technology available, the TELRIC price for access to unbundled network elements should approximate the new entrant’s cost to construct the element. As a result, when the entrant has capital available, it will invest in such facilities, because of the inherent advantages of owning versus leasing facilities. Of course, some investments (such as the total overbuild of existing loop plant) are simply not possible for the foreseeable future, given the magnitude of the investment that would be required. Nevertheless, TELRIC pricing maintains the economic efficiency advantages that would be present if such construction were feasible, while at the same time preserving the incentive to construct should that prove possible.

As the Commission is well aware, the debate between forward-looking long run incremental costs and embedded costs has a long history in the telecommunications industry, and the positions of the interested parties seem to have reversed over time.” It should not allow the latest round of this debate to disrupt the introduction of competition into local telecommunications markets. Any revisions to the TELRIC pricing standard will serve only to engender a new round of court appeals and increase uncertainty in the industry, at a time when the relevant pricing issues have finally been laid to rest by the Supreme Court. The Commission should resist the exhortations of incumbent carriers to meddle with TELRIC methodology or its application.

²⁴ *In re Implementation of Local Competition in Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996)

²⁵ *First Report and Order*, Par. 683-85.

²⁶ *Id.* at Par. 685.

²⁷ See, e.g., Walter G. Bolter, “The FCC’s Selection of a ‘Proper’ Costing Standard after Fifteen Years – What Can We Learn from Docket 18128?”, in *Assessing New Pricing Concepts in Public Utilities*, (Harry F. Trebing, ed., Institute of Public Utilities, Michigan State University, 1978). As reported by Mr. Bolter (then Senior Staff Economist in the Office of Plans and Policy at the FCC), the Bell System was arguing in favor of long-run incremental cost pricing during the period in question.

Conclusion

McLeodUSA shares the Commission's goals for the telecommunications industry: a world of sustainable competition for all voice and data services, regardless of bandwidth demanded, under a regime that encourages investment in the facilities necessary to give customers access to new and innovative services. Clearly, many parties to the current proceedings are vitally interested in the role of unbundled switching (and therefore UNE-P) in meeting these goals. For McLeodUSA, however, attempting to resolve issues surrounding unbundled switching before issues related to loop access is clearly putting the cart before the horse. The Commission should not force carriers to migrate away from unbundled switching until it has assured that there is something effective to migrate to. Only more specific requirements for loop provisioning and quality can provide this assurance.

In the *Triennial Review* and *Broadband NPRM* proceedings, the Commission has the mechanisms to move toward a future of effective, sustainable, facilities-based competition. To do so, however, several key points must remain at the forefront of the Commission's consideration:

Telecommunications Has Become An Industry Of Integrated Services And Networks. Customers do not want, and will not accept, arbitrary limitations on service providers based on how many "kilobits" they provide. In a world of integrated voice, data, and broadband services, customers should not have to worry about regulatory classifications limiting the ways in which, and from whom, they can receive services. Wireline facilities necessary to provide service should be available to all providers for all services.

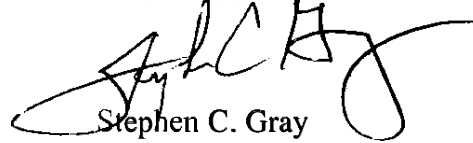
Wireline Suppliers of Integrated Services Need Full and Equal Access to Incumbent Carrier Connections to End Users. "Last mile" connections to customers cannot be duplicated by competitors within the foreseeable future. For competition to thrive, and for carriers to be able to maximize the use of their available investment dollars, competitors must have full and equal access to these loop facilities. Specifically, barriers with respect to IDLC, EELs, and loop provisioning systems need to be removed. Once equal access to loops is available, an appropriate transition away from unbundled switching can be achieved.

Transport Connections Must Continue to be Available to Competing Providers. Reaching end-users without the use of RBOC switching requires either collocation, or a loop/multiplexing/transport combination, in order to connect to the competing carrier's switching platform. In the latter case, transport is an integral part of the solution; in former, it has been McLeodUSA's experience that there are no effective alternatives to RBOC transport in most instances. Regardless, in order for McLeodUSA to make efficient use of its own switching equipment, it must be able to connect that equipment to end-user customers; and that connection typically requires transport from an incumbent carrier.

Pricing for Network Elements Provided by Incumbent Carriers Should be Based on TELRIC. The TELRIC standard is theoretically correct and legally sound. Attempts to undermine that standard result from the desire of certain incumbent carriers to stifle competition and exercise market power. Similarly, arguments that TELRIC provides no incentive for investment are incorrect, and have been explicitly rejected by the Supreme Court. The Commission should not retreat from the TELRIC standard.

We look forward to the opportunity to discuss these thoughts with you at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Stephen C. Gray', with a large, sweeping flourish extending to the right.

Stephen C. Gray
President

cc: Jeff Carlisle
Michelle Carey
Tom Navin
Brent Olson
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Daniel Gonzalez
Eric Einhorn

✓